TEOH SENG KIAN

v.

ONG KOOK LIONG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING MOTION NO: S2(S5)-25-24-1999]
21 SEPTEMBER 2000

CIVIL PROCEDURE: *Contempt of court - Withdrawal of motion - Settlement agreement between parties - Whether committal proceedings may be withdrawn without leave of court - Whether an abuse of process of court*

The applicant had sought to commit the respondents for contempt of court pursuant to O. 52 of the Rules of the High Court 1980. The High Court granted leave in an *ex parte* application taken out by the applicant. Subsequently, both parties entered into a settlement agreement whereby as a term of the settlement the contempt proceedings were to be discontinued. During the hearing of the contempt application, the applicant informed the court of its intention to discontinue the contempt proceedings and urged the court to allow the discontinuance since both parties had no objections.

The High Court posed the following legal issue to be resolved:

Whether once an *ex parte* leave to commit has been given and the applicant, having filed a motion to commit, the said applicant can, on his own and without the leave of the Court, withdraw the committal proceedings, by entering into a settlement agreement with that alleged intention, and whether this constitutes an abuse of the process of the Court?

Held:

[1] The court is mindful of the trend whereby parties take out an *ex parte* order for leave to commit and file a motion and having served the motion, keep asking for postponements pending settlement and then subsequently after settlement, withdraw the motion. This clearly suggests an abuse of the process of the court.

[2] Although the court will not interfere in nor oversee the settlements of disputes, in contempt proceedings where leave is first required to be obtained to initiate such proceedings the court will and must have a right to an overall supervision of such proceedings until conclusion.

[3] It is improper to even suggest that once the court is seized of the matter the parties can seek to exercise any influence over it. The court will have to act upon its own jurisdiction and on its own authority.

[4] In this case, the parties ought to show cause why their act of entering into a settlement agreement without obtaining leave of court wherein the agreement stipulated that the contempt proceedings were to be withdrawn without first stipulating that leave of court must be obtained, did not constitute an abuse of the process of the court.

[Parties to show cause.]

Case(s) referred to:

Amrit Nahata v. Union of India [1986] 73 AIR SC 791 ***(refd)***

Grantham Wholesale Fruit Vegetable v. Potato Merchants Ltd [1972] 1 WLR 559 ***(refd)***

Jennison v. Baker [1972] 2 QB 52 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 52 r. 4

Other source(s) referred to:

Contempt, Arlidge, Eady & Smith, 1999, 2nd edn, para 3-153

For the applicant - Paul Kwong (Sonia Abraham & R Sharmini with him); M/s Azman, Davidson & Co

For the 1st respondent - Wong Kian Kheong (Andrew Chiew with him); M/s Lee Hishamuddin

For the 2nd respondent - VK Lingam (C Vijayakumar, Willian Leong & Lee Kwan Leong with him); M/s William Leong

Reported by Yow Ting Fong

JUDGMENT

RK Nathan J:

The applicant, a company director, sought to commit for contempt of court, both the respondents, pursuant to O. 52 of the Rules of the High Court 1980 (the RHC). The basis for seeking the committal was premised on the following set of facts.

Eight agreements were executed between the respondents as vendors of shares in 34 companies (the said shares) and the appellant and two of his brothers (the Teohs) as the said purchasers. A public announcement was made of the Teohs' intention to acquire a stake in the Ayer Molek Rubber

Company Berhad (the Ayer Molek deal) which involved the said shares and the Teohs also submitted the necessary documents to the Securities Commission evincing their intention to acquire a stake in the Ayer Molek Rubber Company Berhad. The respondents then filed a suit against the Teohs by way of Kuala Lumpur High Court Civil Suit No. D2-22-1755-98 (the first suit) based on a dispute arising from the eight agreements. The respondents obtained on 13 June 1998, a *mareva* injunction in the first suit against the Teohs by way of an *ex parte* application to prevent the Teohs from *inter alia*, dealing with the said shares. The *ex parte* order was served by the respondents on *inter alia*, Bumiputra Merchant Bankers Berhad, who were managing the Ayer Molek deal, presumably with the intention of frustrating the deal. The Teohs then filed an application to set aside the *ex parte* order of 13 June 1998 in the first suit. After hearing both parties, the court on 11 July 1998 varied the *ex parte* order in the first suit to cover shares in respect of only two companies, namely, Meda Kompleks Sdn Bhd and Meda Properties Services Sdn Bhd. The parties were also given liberty to apply to further vary the varied *ex parte* order. The respondents then filed an application for summary judgment against the Teohs in the first suit. The Ayer Molek deal was revised in the light of the order of the court dated 11 July 1998 in the first suit and a public announcement to this effect was also subsequently made. The respondents' application for summary judgment in the first suit was refused by the learned senior assistant registrar and the respondents appealed to the Judge in chambers. In the meantime, on 23 September 1999 parties clarified with the court that the order dated 11 July 1998 varying the *ex parte* order of 13 June 1998 was to cover only the two companies mentioned earlier.

The respondents then filed another suit in the Kuala Lumpur High Court by way of Civil Suit No. D6-24-369-99 (the second suit) against the Teohs and Ayer Molek Rubber Company Berhad, praying for, *inter alia*, a similar injunction as the one they had obtained on 13 June 1998 as varied by an order of court dated 11 July 1998 in the first suit. With the said suit the respondents filed an application for *inter alia*, a *mareva injunction* to be heard on 26 November 1999. The Teohs then promptly filed an application to strike out the second suit and it was then mutually agreed that the court ought to hear the application to strike out the second suit first, and it was then adjourned to 27 April 2000 for hearing. In the meantime, an interim "holding over' injunction was granted.

The Application For Contempt Proceedings

The applicant contended that from the said chronology of events, it was obvious that notwithstanding that the variation of the order dated 13 June 1998 on 11 July 1998 was clearly understood to have meant to cover only the said two companies, the respondents through their solicitors, had intentionally made things difficult for the Teohs by giving a distorted interpretation to the said order of court dated 11 July 1998, thus necessitating an application to be made to court for clarification as was done on 23 September 1999. The applicant further contended that being discontented even with the clarification, the respondents had filed the second suit to side step the varied order dated 11 July 1998 and had thereby blatantly abused the process of the court and had thereby by their manipulative conduct frustrated the Ayer Molek deal. The applicant contended that such calculated conduct clearly amounts to a contempt of this court. It was pointed out in the application for leave to commit, that the respondents have brought the due process of this court into serious disrepute by "surreptitiously going behind the order dated 11 July 1998 granted by his Lordship Justice Dato' Abdul Aziz bin Mohamed by filing the second suit" when the respondents ought to have defended the variation of the *ex parte* order dated 13 June 1998 after the learned judge had heard submissions of counsel for both the Teohs and the respondents. It was further pointed out that the conduct of the respondents was even more inexcusable when the order dated 11 July 1998 clearly granted liberty to the parties to apply to re-vary the said order and this therefore was further evidence of their calculated scheme. The applicant filed a statement in support of his application for *ex parte* leave to commit in which he narrated the above facts and verified the contents of the said statement by an affidavit in support of the said *ex parte* application for leave to commit (encl. 3). By a directive from the chief judge Malaya dated 28 February 2000, this court, being the court to hear all contempt cases was directed to hear the said application although the committal proceedings were commenced in another civil court.

On 10 March 2000 I granted an order in terms of encl. 3. Pursuant to the said order, on the next day the applicant filed a notice of motion (encl. 9) and prayed for the following orders:

(a) That the respondents Ong Kook Liong (NRIC No. 600927-10-6353) and Chew Lak Seong (NRIC No. 551201-05-5245) have committed contempt of this Honourable Court are to be punished for such contempt with committal to prison for the said contempt as a result of an abuse of the process of this Honourable Court by filing Civil Suit No. D6-24-363-99 in this Honourable Court;

(b) Further or other relief or direction;

(c) The respondents pay the costs of this application.

The applicant stated that at the hearing of the said notice of motion he would be relying on the grounds contained in the statement and the affidavit affirmed in support of the *ex parte* application. The said application was fixed for hearing on 28 March 2000. On the said date Mr. D.P. Naban appearing for the respondents informed the court that the clients were overseas and that he was making arrangements for service to be effected. I then fixed the hearing of encl. 9 to 17 April 2000. In the meantime, the 2nd respondent, through his counsel, filed a notice of motion (encl. 18) to set aside the *ex parte* order and the committal proceedings. When encl. 18 came up for hearing on 17 April 2000, Dato' V.K. Lingam for the 2nd respondent asked for more time to research the matter. I then adjourned hearing of encl. 9 and 18 to 5 May 2000. After numerous adjournments encl. 9 was fixed for hearing on 7 July 2000.

The Application To Discontinue The Contempt Proceedings

On the day fixed, Mr. Paul Kwong, appearing for the applicant, informed the court that he wished to discontinue with the contempt proceedings and that I ought to do so, since the respondents themselves had no objections to the said discontinuance. He informed the court that the parties had entered into an overall "settlement agreement" and that one of the terms was that the applicant ought to withdraw these contempt proceedings. I then asked counsel whether they could in fact discontinue the matter at will since they had proceeded to act, after obtaining leave. Half way through his submissions, Mr. Paul Kwang sought an adjournment to do further research on the matter. I then fixed the matter for continuation to 31 July 2000. Continuing with his submissions on the adjourned date, Mr. Paul Kwong referred the court to O. 52 r. 4 of the RHC and argued that I had the jurisdiction to discontinue the matter.

O. 52 r. 4 reads as follows:

> 4 Saving for power to commit without application for purpose
>
> Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court to make an order of committal of its own motion against a person guilty of contempt of Court.

When I pointed out that r. 4 deals with the court's power to order committal of its own motion against a person guilty of contempt of court and does not refer at all to the discontinuance of the matter, counsel asked for more time to research the law I then fixed the matter for continuation to 11 September 2000.

On 11 September 2000 1 had to deal with the following application:

(1) Enclosure 14 which was the 1st respondent's application to set aside the *ex parte* order granted on 10 March 2000.

(2) Enclosure 18 which was the 2nd respondent's application for the same purpose.

(3) Enclosure 25 which was the 2nd respondent's application for stay of proceedings or for a transfer of the said proceedings to the D6 court.

Before hearing all the said applications I directed all counsel to my earlier question posed on numerous occasions. The said question was:

> Whether once an *ex parte* leave to commit has been given and the applicant, having filed a motion to commit, the said applicant can, on his own and without the leave of the Court, withdraw the committal proceedings, by entering into a settlement agreement with that alleged intention, and whether this constitutes an abuse of the process of the Court?

Reason For The Court's Poser

From the moment that the applicant intended to withdraw the committal proceedings I had informed all counsel that since this court is the only designated court in Kuala Lumpur to hear all contempt cases, this court has been inundated with applications for leave to commit and for subsequent motions for committal. Applications have been filed by wives against husbands and vice versa, by company directors against one another, by dissatisfied judgment creditors against judgment debtors and so on. It seems to become a trend for parties to take out an *ex parte* order for leave to commit and file a motion and having served the motion, then to keep on asking for postponements pending settlement and then subsequently after settlement, to withdraw the motion. To my mind this clearly suggests of an abuse of the process of the court because the power of committal proceedings is being used as the sword of damocles to hang over the head of the alleged contemnor. To my mind unless serious thought is given to this procedure, contempt proceedings is being abused by litigants on advice of their solicitors. It seems to me as being extremely patronising conduct of the bar, on the one hand to protest that the courts are too ready to

initiate contempt proceedings, when it is the very same legal advisers who advise their clients to move the court for contempt and in most cases to seek custodial sentences as in this case where the applicant sought custodial sentence. This incongruity must be addressed seriously by the bench and the bar. Considering the recent fervour against contempt proceedings and the laudable move of the bar council in drafting an act to regulate contempt proceedings, I decided that the time was now appropriate to make a decision an the question I posed to counsel.

Findings Of The Court

Mr. Paul Kwong for the applicant conceded that the parties cannot compromise or interfere with the rights of this court to exercise its discretion. He submitted that even if the compromise agreement said that the applicant was not going to proceed with the contempt proceedings, the court need not pay any heed to it.

He conceded that the settlement agreement had no effect at all on the existing contempt proceedings. Indeed I think he is right. In *In re Grantham Wholesale Fruit Vegetable and Potato Merchants Ltd* [1972] 1 WLR 559, R, a chartered accountant, was appointed as liquidator of a company. R had failed to comply with his statutory obligations under the Companies Act 1948 and the rules made thereunder. Despite numerous reminders and due to his abject failure to act, the department of Trade and Industry served him with a notice of motion to commit him for contempt. When the matter came up before the learned judge the registrar of companies (the ROC) informed the court that R had by then complied with his obligations and that the ROC now only sought to recover costs with no further order. Megarry J (as he then was) said at p. 566 as follows:

> Second, in opening the motion, Mr. Lindsay said that the Registrar of Companies was not seeking any order save an order that Mr. Reaves pay the costs of the motion. Let me make it clear than in my judgment such a statement in no way fetters the court in deciding what is the appropriate order to make. It is true that unless the matter is brought before the court, the court will not know of the contempt and so will not be able to make any order in respect of it. But I do not think that for this or any other reason the law can be that once the court is seised of a case of disobedience to an order of the court, the jurisdiction of the court is in any way fettered by what counsel says when opening the matter. Indeed, by R.S.C., O. 52, r. 5, the jurisdiction of the court of its own motion to commit for contempt is expressly saved. But though the jurisdiction is not fettered, what counsel says must be borne in mind in deciding what penalty to impose, particularly when what counsel says is in line with what has been said and done in a number of previous cases.

Mr. Paul Kwong however referred me to Arlidge, Eady & Smith on *Contempt* 2nd edn (1999) and to paras 3-153 which reads as follows:

> A criminal contempt cannot be waived by a person aggrieved by the conduct, or disposed of between the parties for pecuniary consideration. There is some authority to suggest that a civil contempt may be waived. For example, Lord Diplock in *Att.-Gen. v. Times Newspapers Ltd* ([1974] AC 273, 307-308) makes the point that:
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> > ... there is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity; but no sufficient public interest is served by punishing the offender if the only person for whose benefit the order 'was made chooses not to Insist on its enforcement...

I am of the view that there is a real danger in merely citing a passage from a judgment, whilst not referring to the facts of the case. In *Att.-Gen, v. Times Newspapers Ltd* the respondents had published articles relating to the plight of thalidomite children whilst litigation against the manufacturer of the drug containing thalidomite, was still pending. The House of Lords held that it was contempt of court to publish material which prejudiced the issue of pending litigation. The rationale for this was that "parties to litigation are entitled to the same freedom from interference in negotiating the settlement of a civil action as they are from interference in the trial of court" (see Lord Diplock at p. 311).

The quotation relied on by Mr. Paul Kwong related to the distinction made by the House of Lords between a disobedience by a party to a civil action of a specific order of the court made on him in that action, and the publication by a newspaper of a pending matter that might influence the litigant in the future conduct of his case.

Mr. K.K. Wong submitting for the lst respondent also conceded that the parties' attempt at compromise did not fetter this court's discretion to proceed with the contempt proceedings. Referring to the compromise agreement and in particular to cl. 6.4, Mr. Wong submitted that the said clause did not "amount to usurping this court's discretion to proceed" with the contempt proceedings.

Dato' V.K. Lingam for the 2nd respondent submitted that there is no requirement of the law to get the leave of this court to enter into the compromise agreement, He submitted that the jurisdiction of the court has not been taken away or abrogated by the compromise agreement. He requested that if the court disagreed, then it should frame the charge with

sufficient particularity to enable his client to file affidavits and to answer the charge.

In *Amrit Nahata v. Union of India* [1986] 73 AIR SC 791 the Supreme Court of India had occasion to consider a similar application to withdraw contempt proceedings. In considering the issue D.A. Desai J said at p. 792/793 as follows:

> While considering the request for withdrawal of the proceedings initiated for taking action for contempt of the court, the court would generally be guided by the broad facts of the case and more particularly whether respect for judicial process would be enhanced or dwindled by either granting or refusing to grant the request. There is a marked difference between a complaint made by an individual for wrong done to him and a petition moved before this court inviting the court to take notice of the fact that its contempt has been committed. The contempt is of the court and not of the individual. Therefore, Sec. 15 of the Contempt of Courts Act, 1971 confers power on this Court as well as on the High Court to take suo moto action or on a motion made by, amongst others, the Solicitor General. It is for the court to determine whether the act complained of tending to scandalise the Court if viewed with certain severity with a view to punishing the person would in the larger interest of the society enhance respect for the judicial process, or too sensitive attitude in such matter may even become counter-productive. The power to commit for contempt of court has to be exercised with the greatest caution. Neither too sensitive attitude nor an easy escape from performing the harsh duty would help in maintaining respect and decorum for the judicial process which is essential for establishing a Society based on rule of law. The Court is to steer clear between two extremes but it must be remembered that the petitioner who has moved for taking action in contempt is not entitled as a matter of right to withdraw the petition whenever it suits his purpose. Once the act, which *prima facie* shows that contempt of the court has been committed is brought to the notice of the court, it is the court which has to decide whether the contempt has been committed or not or whether it is appropriate to take action or at a later date whether to drop the proceedings. The matter is primarily between the court and the contemnor.

It is pertinent to reproduce cl. 6.4 of the compromise agreement, which reads as follows:

> In view of the settlement under this Agreement, the Second Party agrees to inform the Honourable Court that the parties have resolved the dispute and differences and wish not to proceed further with the contempt proceedings.

Whilst it is trite that the court will not interfere nor oversea settlements of disputes (unless in cases where minors and persons under disability are involved) in contempt proceedings where leave is first required to be obtained to initiate such proceedings, this court will and must have a right

to an overall supervision of such proceedings until conclusion. I have perused the compromise agreement. Nowhere in the said agreement has it been stated, that in so far as these contempt proceedings are concerned the withdrawal of the same, is subject to this court's approval. Dato' Lingam has argued that there is no law, no authority available to show that to enter into a compromise agreement involving the parties' disputes as vendors and purchasers and to settle their global differences fully and finally, leave of the court is required. He is absolutely right. But unfortunately Dato' Lingam has side-stepped the question posed by the court. He has not addressed me on my poser as to the requirement of leave to withdraw the contempt proceedings. By totally disregarding the question of the need to require the court's consent to withdraw the committal proceedings, the parties will have to explain their conduct.

There is therefore clear authority for the court to act suo moto and to require the parties to show cause (see *Amrit Nahata supra*). In *Jennison v. Baker* [1972] 2 QB 52 where there had been flagrant breaches of the orders of the court, the Court of Appeal proceeded of its own motion to deal with the landlady's contempt, irrespective of the fact that her campaign of harassment had succeeded in emptying the property, and that there was accordingly no longer any purpose to be served by the original order which she had flouted. In the case before me, it was solely upon the information brought by the applicant that this court entertained the question of committing for contempt. It is improper to even suggest that once the court is seised of the matter the parties can seek to exercise any influence over it. The court will have to act upon its own jurisdiction and on its own authority. I have no doubt that this is a case where the parties ought to show cause to this court why their act of not obtaining leave of this court to enter into a compromise agreement wherein cl. 6.4 stipulated that these contempt proceedings be withdrawn without first stipulating that the leave of this court must be obtained, does not constitute an abuse of the process of this court. Since the parties have failed to satisfy me on the question posed, I shall formulate the charges against the parties who shall appear before me on 10 October 2000 to show cause.